82-5305

CASE NO. A-52

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1981

JAMES ERNEST HITCHCOCK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

RICHARD B. GREENE
Assistant Public Defender

Counsel for Petitioner

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Petitioner prays that a writ of certioari issue to review the judgment of the Supreme Court of Florida filed on February 25, 1982, rehearing denied May 27, 1982.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida is reported as Hitchcock v. State, 413 So.2d 741 (Fla. 1982) and is set out in pages 1a-9a in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Florida was filed on February 25, 1982, and petitioner's timely motion for rehearing was denied by order dated May 27, 1982 (10 a). On July 20, 1982 Justice Powell signed an order extending the time for filing the petition for writ of certiorari to and including August 25, 1982. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3), petitioner having asserted below and ascerting herein deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner's Death Sentence after a plea agreement of life imprisonment constitutes a denial of his right to trial by jury, right to remain silent, and a denial of equal protection?

2. Whether the rape portion of aggravating circumstance 5 (d) of §921.141, Fla. Stat. (1977) is so vague and confusing as to be unconstitutional as applied and on its face?

3. Whether Petitioner was denied his right to a fair cross-section of the community by Florida's exemption, on request, of mothers with children, from service on juries?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. This cause also involves Sections 40.01 (1) and 921.141 Florida Statutes (1977) which are set out in their entirety on pages 11a-13a of the Appendix hereto.

STATEMENT OF THE CASE *

Petitioner was indicted for first degree murder on August 6, 1976 (R 1). On August 11, 1976 Petitioner was determined to be indigent and counsel was appointed (R 2). On the same day, Petitioner entered a plea of not guilty (R 2).

Trial by jury was held on January 18-21, 1977 (T 1-1004). Petitioner moved for a judgment of acquittal at the close of Respondent's evidence (T 711-719). The trial court partially denied the motion and partially reserved ruling on the motion (T 719). Petitioner was convicted of first degree murder (T 998).

The penalty phase of the trial took place on February 4, 1977 (TAS). The jury returned an advisory sentence of death (TAS 63). On February 11, 1977, Petitioner was sentenced to death (R 192-193).

The present case involves the death of Cynthia Ann Driggers, which took place on July 31, 1976 in Winter Garden, Florida. The prosecution's case can be classified in three general areas. The first area consists of the testimony of two family

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* The symbol A will denote the Appendix. The following additional symobols will be used:

R	Record on Appeal
T	Trial Transcript
TS	Transcript of Sentencing
TAS	Transcript of Advisory Sentencing Proceeding

members who testified about the events of the night of the homicide and the next day. The second area involves the testimony of arresting and investigating officers and crime scene technicians. The third area involved Appellant's statement given to the police.

Richard Hitchcock and his wife constituted the first area of testimony. Judy Hitchcock, sister-in-law of Petitioner and mother of the decedent, testified that she went to bed shortly after midnight and that the decedent went to bed shortly thereafter (T 247-248). She woke up about 6 A.M. and found that the decedent's door was open slightly and she was not there (T 251-252). She said the decedent's body was found about 3:00 P.M. (T 262). She also testified that the Petitioner had never hit or disciplined any of the children (T 267). Richard Hitchcock testified the decedent went to bed around 12:30 (T 276). He stated his wife woke him up a little after 6:00 A.M. to look for the decedent. He found her body between 3:00 and 3:30 P.M. on July 31, 1976 (T 299).

The second area of testimony began with Deputy Bernard Greer of the Orange County Sheriff's Department, who got a call at 3:29 P.M. on July 31, 1976 and when he arrived he was met by the Winter Garden Police (T 313-314). Deputy Robert Gosselin of the Orange County Sheriff's Department, Technical Services Division, testified concerning photos of the immediate area where the body was found and physical evidence taken from this area (T 320-408). Arthur McGraw, crime scene technician of the Orange County Sheriff's Department stated that he went to the residence in Winter Garden on either August 1st or 8th, 1976 and took three photos of the area and collected some green plastic material (T 410). Detective Alan Hansen, Orange County deputy, stated that he took hairs from Petitioner on July 31, 1976 and from Richard Hitchcock on August 3, 1976 (T 432-442).

Dr. Guillermo Ruiz stated that he got a call at 5:12 P.M. on July 31, 1976 and arrived in Winter Garden at 6:10 P.M. (T 490-491). The decedent was identified by Richard Hitchcock and was pronounced dead on arrival (T 494-496). He stated that the decedent had died by asphyxiation due to strangulation (T 496). He stated the decedent's hymen had been recently lacerated and

and that this was normal for the first time a woman had intercourse (T 507-508, 518). Dr. Charles Hall collected blood and saliva samples from Petitioner in the jail (T 523-531).

Dr. Stephen Platt, forensic chemist examined a pair of trousers found in the Hitchcocks' house for the presence of blood (R 544). He said that 19 per cent of the population, including Cynthia Driggers, has blood consistent with the blood on the pants (R 552-554). He also stated that people from the same family tend to have the same blood types and that he failed to check the blood of Richard Hitchcock (R 581-584). Diana Bass, microanalyst fromthe Sanford Crime Laboratory stated that she examined a loose hair found on the vagina of the decedent and that it was consistent with that of Petitioner and inconsistent with that of the decedent and Richard Hitchcock (R 629-635).

Detective Dan Nazarchuk of the Orange County Sheriff's Department began the third area of testimony by describing the conditions surrounding Petitioner's "confession" (T 670-671). This statement was admitted over renewed objection (R 673-674). He played a statement Petitioner made to the police on August 4, 1976 in which Petitioner stated he lost control of himself and killed the decedent after she threatened to tell her mother about their sexual activity (T 687-699). Detective Nazarchuk stated that on July 31 and August 1 Petitioner had denied causing the death of Cynthia Driggers (T 703-705). The prosecution then rested (T 711). Petitioner then moved for a judgment of acquittal which the judge denied as to premeditation and reserved ruling regarding felony murder (T 711-719).

The evidence presented by Petitioner consisted of two areas. The first area was testimony about the early lives of the Hitchcocks, their violence or lack thereof, and Petitioner's actions around children. The second area consisted of Petitioner's testimony on the stand regarding the incident.

Roy Carpenter, the first defense witness, stated that on the day after the homicide Petitioner came to him trying to organize a search party to look for the decedent (T 725). Sergeant Rick

Dawes of the Winter Garden Police Department stated that Petitioner voluntarily turned himself in (T 726-727). Archie Sooter, a friend of Petitioner's attempted to answer questions about Petitioner's lack of violence and his actions around children, but the State's objections were sustained (T 731-732).

Martha Hitchcock, sister of Petitioner and Richard Hitchcock, was not allowed to testify concerning the Hitchcocks' early background, their parents, their violence or lack thereof, and as to the fact that Richard Hitchcok had made sexual advances towards her (T 734-738). James Harold Hitchcock, brother of Petitioner and Richard, stated that he had never known Petitioner to be violent (T 739). He was not allowed to answer questions concerning Richard Hitchcock's reputation for violence or specific acts of violence of Richard (T 740-741). He was also kept from discussing Petitioner's actions around children and about the early life of Petitioner and Richard (T 741-743). Fay Hitchcock, wife of James H. Hitchcock, was also prohibited from testifying about petitioner's actions around children (T 744-745). Brenda Reed, sister of Richard and Petitioner, was also not allowed to answer questions about Petitioner and Richard (T 746-748). The Hitchcocks' mother, Loreen Galloway, was also restricted by the court in discussing the early lives of her children (T 749-751).

Petitioner, James Ernest Hitchcock, stated that on the night of the homicide he was at home until about 10:30 P.M. (T 757). He returned home about 2:30 A.M. after drinking beer heavily and smoking some marijuana (T 760-763). After he came home, he and Cynthia had voluntary sexual relations when they were discovered about 3:00 A.M. by Richard (T 762-763). He then saw Richard take Cynthia out of the house and choke her (T 765). Petitioner kicked Richard off of her (T 765), but she was already dead (T 766). Richard cried and asked Petitioner what he could do (T 766). Petitioner said he would help him take care of it (T 766). Petitioner then went to the dining room window and pushed the screen off to make it look like some one had broken in (T767).

After hearing that the police wanted to question him, Petitioner turned himself in and after four days he made a statement to the police because he felt he did not have anything to live for

since his girl friend had left him and he felt sorry for Richard (T 772-773, 777). He explained how Richard had been like a father to him and how he wanted to see him stay with his family (T 777). When he was in jail his mother and sister came to see him everyday and he began to regain hope and decided to come forward with the truth about the homicide (T 776-777).

Petitioner denied attacking the decedent (T 783). He stated that Cynthia's blood got onto his pants when he moved her body after Richard had killed her (T 787). Petitioner attempted to proffer testimony about Richard's reputation for violence and his violent acts. This proffer was denied (T 794-795). The defense then rested (T 795).

The prosecution put on Richard Hitchcock and his wife, Judy in rebuttal. Judy Hitchcock testified as to Petitioner's reputation for violence and for truth and veracity (T 798). She was allowed to testify, over objection, about an incident between Petitioner and his girlfriend (T 805-807). Richard testified that Petitioner's reputation for violence and for truth and veracity was bad (T 813-814). The State then rested (T 821).

Petitioner then called Connie Reed, Appellant's girlfriend, to rebut testimony concerning an alleged incident. She stated that Petitioner didnot hurt her (T 823). She also stated she was not frightened (T 829). Petitioner then renewed his motion for judgment of acquittal (T 834). This was denied (T 841). On the basis of this evidence Petitioner was convicted of first degree murder (T 997-998).

On January 28, 1977 the sentencing phase of Petitioner's trial was held. The state presented no evidence (TAS 6).

Petitioner called James H. Hitchcock, who described Petitioner's habit of sucking on gas when he was young and detailed how this affected his mind (TAS 6-8).

He said that his father had died when Petitioner was young, after having been bedridden for eight months (TAS 9). On the basis of the foregoing evidence the jury recommended the death sentence (TAS 62-63).

Sentencing was held on February 11, 1977. Petitioner unsuccessfully requested that a presentence investigation report be prepared (TS 2). Even though acknowledging that the judge and the state had previously offered to Petitioner that he plead guilty to first degree murder with a life sentence (which offer Petitioner declined), the judge sentenced Petitioner to death (TS 7, R 192-193).

Petitioner's conviction and sentence were affirmed by the Supreme Court of Florida, although two of the six justices dissented and stated that they would reduce the sentence to life imprisonment.

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

1. Sentencing petitioner to death after the prosecution and judge had approved a life sentence.

The Supreme Court of Florida in the present case has affirmed petitioner's death sentence after the jduge and prosecution had approved a plea agreement and a life sentence. There is nothing in the judge's sentencing order or his findings of fact which would explain why death in the electric chair was the appropraite penalty after trial, while life imprisonment was the appropriate penalty prior to trial.

The federal constitutional issue presented is whether a judge may sentence a defendant to death, after approving a life sentence prior to trial; without affirmatively stating what new information he had received which mandated the imposition of the ultimate penalty.

The present case is appropriate for review on certiorari because it involves a serious constitutional question; indeed, it is a question involving the propriety of the death sentence. It is a question not previously addressed by this Court and is likely to arise again due to the widespread nature of plea bargaining in our criminal justice system.

This issue concerns the propriety of Petitioner's death sentence after a plea agreement of life imprisonment was approved by the Court and the prosecution. This issue involves Petitioner's right to a jury trial and right to remain silent.

Prior to trial, the court and the state agreed to a plea of nolo contendre to first degree murder and a life sentence upon that plea (TS 5-6). Petitioner declined the plea and ultimately was sentenced to death (TS 1-10). There is nothing in the judge's sentencing order or his findings of fact which would explain why death in the electric chair was the appropriate penalty after trial, while life imprisonment was the appropriate penalty prior to trial. Therefore it appears that Petitioner was sentenced to die primarily for asseting his Fifth and Sixth Amendment rights.

The right to a jury trial is a fundamental right, essential to our system of justice. Duncan v. Louisiana, 391 U.S. 145, 158, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). The courts have long held that penalizing a defendant for exercising this right or the right to remain silent does not comport with due process. Thomas v. United States, 368 F.2d 941 (5th Cir. 1966); United States v. Stockwell, 472 F.2d 1186 (9th Cir. 1973); United States v. Wiley, 278 F.2d 500 (7th Cir. 1960). The courts have often applied this in the context of sentencing a defendant to a greater term because he has put the state to the expense of a trial. This has cinsistentely been held to be improper. Hess v. United States, 496 F.2d 936 (8th Cir. 1974); United States v. Derrick, 519 F.2d 1 (6th Cir. 1975), Poteet v. Fauver, 517 F.2d 393 (2nd Cir. 1975). While it is true that these principles do not automatically invalidate all plea bargaining agreements, it is clear that no person can be penalized for the exercise of his constitutional rights. United States v. Jackson, 390 U.S. 570, 581, 88 S.Ct. 1209, 1216, 20 L.Ed.2d 138 (1968).

It is also clear that when the Court has been involved in plea bargaining the record must affirmatively show that no weight was given to the refusal to plead guilty. As the Court stated in United States v. Stockwell, 472 F.2d 1186 (9th Cir. 1973):

> Accordingly, once it appears in the record that the court has taken a hand in plea bargaining, that a tentaive sentence has been discussed, and that a harsher sentence has followed a breakdown in negotiations, the record must show that no improper weight was given the failure to plead guilty. Id. at 1188.

Thus, a case must be either reformed to the sentence offered at the plea conference or remanded for resentencing unless the record affirmatively shows that no weight was given to the failure to plead guilty. Hess v. United States, 496 F.2d 936 (8th Cir. 1974).

There remains to be discussed the overriding factor in the present case: the death penalty. "Death is different"; this Court and the United States Supreme Court have repeatedly recognized that fact. See, e.g. State v. Dixon, 283 So.2d 1 (Fla. 1973); Lockett v. Ohio, 438 U.S. 588 (1978). The unique nature of the death penalty has mandated greater procedural safeguards in several circumstances. Gardner v. Florida, 430 U.S. 349 (1977). It has also mandated a requirement of individulized sentencing. Lockett v. Ohio, 438 U.S. 586 (1978). The unique nature of the death penalty has even overcome state procedural requirements. Green v. Georgia, 442 U.S. 95 (1979). The unique nature of capital punishment has led this Court to prohibit mandatory sentencing in capital cases. Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 337 (1976). The unique nature of the death penalty has led this Court to strictly limit the crimes for which is available. Coker v. Georgia, 448 U.S. 903 (1977).

There are two general principles arising from the uniqueness of the death penalty. These principles impact strongly upon the issue-at-bar. The first general principle is that the death sentence demands a greater need for rationality and the appearance of rationality in the decision to impose the ultimate penalty. See Gardner v. Florida, 430 U.S. 349, 358 (1977); Presnell v. Georgia, 434 U.S. 14 (1978). Then the appearance of any improper factor influencing the decision to impose the death penalty must be disapproved. The second general principle is that the ultimate penalty mandates a greater need for reliability than any other punishment. See, e.g. Lockett v. Ohio, supra, 438 U.S. at 604. Basing a decision to impose the extreme penalty of

of death on an impermissible factor (such as the refusal of a court offered plea) is plainly unreliable.

The specific principle governing the issue-at-bar involves the uniquely coercive nature of the death penalty. In Green v. United States, 355 U.S. 184 (1957) the Court found that double jeopardy barred a retrial for first degree murder after a successful appeal from a second degree murder conviction. Because first degree murder carried the death penalty the Court took particular note of the "desperate choice" and the "incredible dilemma" that would face a defendant deciding to appeal if double jeopardy was not at bar. Id. at 193. Likewise in Fay v. Noia, 372 U.S. 391 (1963) the Court found that a defendant's decision not to appeal his life sentence for a capital crime was not a waiver, but rather was a refusal to play "Russian Roulette". Id. at 440.

The power of the death penalty to coerce pleas and thus to impinge severly on the exercise of rights to trial, against self-incrimination and to equal protection has been fully recognized by this Court. In United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), this Court struck down the death penalty provisions of the Federal Kidnapping Act. It was found that the fear of the death penalty needlessly coerced defendants into giving up their right to trial -- since a defendant could only receive a death sentence upon a jury recommendation. See also Pope v. United States, 392 U.S. 651 (1968); Lockett v. Ohio, supra, 438 at 617-619 (Blackmun, J., concurring). Moreover, recent cases have reaffirmed that regardless of the propriety of "encouraging" pleas by offers of lenient sentences where imprisonment is involved, such "encouragement" is absolutely constitutionally impermissible where the death penalty is involved. Corbitt v. New Jersey, 439 U.S. 212 (1979).

Subjecting a defendant to even the possibility of a death sentence because of the exercise of his constitutional right to trial is constitutionally invalid. Petitioner was sentenced to die by the judge, who, prior to Petitioner's exercise of his right to trial, had affirmatively agreed to and offered Petitioner a sentence of life imprisonment. The trialjudge imposed the

ultimate penalty without the record reflecting any reason why Petitioner's death had become the appropriate penalty after trial when life imprisonment was appropriate before trial.

The Florida Supreme Court did not reach the legal issues involved in this question. It stated that the trial judge had not actually agreed to a life sentence (6a). However, it is clear from the record that the judge had actually agreed to a life sentence prior to trial (TS 1-101). At sentencing, the following exchange took place between defense counsel and the judge:

> "Defense Counsel: I would also remind the Court that prior to the trial, the Court did agree to a plea of nolo contendere giving the defendant a life sentence upon that plea. I have nothing further.
>
> THE COURT: I think the record ought to show that the matters we discussed, there was never any understanding, because your client didn't want to consider any plea.
>
> DEFENSE COUNSEL: That plea was offered to him by the State and the Court, however. And, it is true he declined to enter that plea." (TS 5-6).

It is clear that the prosecution and the court had approved a life sentence, although Petitioner rejected it and chose to go to trial.

Accordingly, this Court should grant certiorari in the present case to review the significant constitutional question of whether sentencing a defendant to death, after the trial court has approved a life sentence, is permissible without affirmatively stating the reasons for the increased penalty. This issue involves the right to trial by jury, the right to remain silent, equal protection, and the unique due process considerations involved in capital sentencing. This issue is likely to arise again, due to the frequency of plea bargaining in our criminal justice system.

2. Employing the rape portion of aggravating circumstance 5 (d) of §921.141, Fla. Stat. (1977); which is so vague and confusing as to be unconstitutional on its face and as applied.

The Supreme Court of Florida in the present case has upheld the rape portion of Section 921.141 (5) (d) despoite the fact that the crime of rape no longer exists in Florida. The new offense of sexual battery is substantially different in both its definition

and the range of penalties from the prior crime of rape.

The federal constitutional issue presented is whether the Florida Supreme Court's judicial recasting of Section 921.141 (5) (d) constitutes such a vague and broad construction as to violate the Eighth and Fourteenth Amendments.

The present case is proper for review by this Court because it involves a serious constitutional question not previously addressed by this Court. This issue is likely to arise again as this aggravating circumstance is often employed in Florida in imposing death sentences.

It is clear that a statute, especially a penal statute, must be definite to be valid. Locklin v. Pridgeon, 30 So.2d 102 (Fla. 1947). An attack on a statute's constitutionality must "necessarily succeed" if its language is indefinite. D'Alemberte v. Anderson, 349 So.2d 164 (Fla. 1977). Thus, definiteness is essential to the constitutionality of a statute. It has also been established that criminal statutes must be strictly construed according to the letter thereof and that all doubt must be resolved in favor of the citizen and against the state. State v. Wershaw, 343 So.2d 605, 608 (Fla. 1977). The danger of indefiniteness is not simply the lack of notice to the defendant but also the possibility of arbitrary and discriminatory application of the statute:

> "If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissably delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.." Grayned v. City of Rockford, 407 U.S. 104, 109 (1972).

Thus, a statute must be definite enought to give a defendant specific notice and must not be subject to the dangers of arbitrary application of the statute by judges and juries.

The dangers of arbitrary application and lack of notice are increased in a capital case. This Court has recognized that death is different from any other punishment which can be imposed and calls for a greater degree of reliability due to its severity and finality. E.g., Lockett v. Ohio, 438 U.S. 586 (1978). It

is also clear that the notice requirement of the Due Process Clause applies to the penalty proceedings in a capital case. Presnell v. Georgia, 439 U.S. 14, 15-18 (1978).

Petitioner directly suffered from the vagueness of this aggravating factor. When the judge instructed the jury on the aggravating factors he instructed the jury that if the capital felony was committed during an "involuntary sexual battery" it is an aggravating circumstance (TAS 56). Petitioner timely objected to this instruction (R 175, 206; (TAS 61-62). This language is nowhere in the Florida Statutes or the Standard Jury Instructions. The Florida Statutes state that if a capital felony is committed during a "rape", that this is an aggravating factor. §921.141 (5)(d) Fla.Stat. (1977). The standard jury instructions contain no mention of "rape; "involuntary sexual battery", or any other sexual offense in aggravation. Florida Standard Jury Instructions In Criminal Cases, 77 (2d Ed. 1975). Thus, when the judge instructed the jury on involuntary sexual battery when he instructed on this aggravating factor in the penalty phase.

The problems with this aggravating factor can not be met by merely asserting that first "involuntary sexual battery" and then sexual battery have replaced rape as an aggravating factor. It is clear that if one looks at the history of the capital felony statute, the rape statute, and the sexual battery statute one can see substantial differences between the sexual battery statutes and the rape statute. These differences leave this aggravating circumstance unconstitutionally vague.

At the time §921.141 was first passed rape was a capital felony which could be committed in only two ways. Ch. 794, Fla.Stat. (1971). The statutes specifically required that the crime be committed "by force" if the victim was ten years old or more. In December of 1972 the Florida Legislature amended Section 921.141 to its present form. Ch. 72-724, Laws of Fla. Chapter 72-724 also amended the rape statute to create two different crimes of rape -- one a capital felony and one a life felony. Capital rape only involved cases where the victim was under eleven years of age. The life felony of rape still required the actual use of force when

the victim was over the age of eleven. Ch. 72-724 Laws of Fla.

In 1974 the Florida Legislature abolished the crime of rape in Florida and passed a statute relating to "Involuntary Sexual Battery". Ch. 74-121, Laws of Fla. This statute created a capital felony, life felony, first degree felony, and second degree felony of involuntary sexual battery.

The first degree felonyof involuntary sexual battery could be accomplished without the actual use of physical force (even if the victim is over eleven) unlike the old rape statute. Ch. 74-121, §3, Laws of Fla. Since October 1, 1974 there has been no crime of "rape" in Florida.

The next year the Florida Legislature passed the present sexual battery statute. Chapter 75-298, Laws of Fla. Under the present scheme there is one type of capital sexual battery, two types of life sexual battery, six types of first degree sexual battery, and one type of second degree sexual battery. The offense of first degree sexual battery can be committed without the use of actual force (even if the victim is over the age of eleven) unlike the former rape statute. Thus, it is clear that the present sexual battery statute and the previous involuntary sexual battery statute are very different from the original rape statutes.

There has been no valid aggravating circumstance of rape since the rape statute was repealed. When the Florida Legislature passed the involuntary sexual battery and sexual battery laws it had ample opportunity to amend Section 921.141 and redefine the aggravating circumstances and yet it failed to do this. This Court implicitly recognized that there is no valid aggravating circumstance of rape or sexual battery when it promulgated the standard jury instructions. Standard Jury Instructions In Criminal Cases, 327 So.2d 6 (Fla. 1976). The standard jury instructions list all the offenses in §921.141 as aggravating circumstances, except for the offense of rape. Fla.Stand.Jry Instr. (Crim.) Penalty Proceedings-Capital Cases. The judge went outside the Florida Statutes and the standard jury instructions to instruct on the aggravating circumstance of "involuntary sexual battery."

Therefore, there is no valid aggravating circumstance of involuntary sexual battery, sexual battery, or rape. When a human being's life is at stake this type of vagueness and potential arbitrariness does not satisfy the requirements of due process.

In the present case, the Florida Supreme Court has attempted to respond to the problems inherent in this aggravating factor by judicially substituting sexual battery for rape. This is clearly improper as there are distinct differences between the current sexual battery statute and the prior rape statute.

The current sexual battery statute, §794.011 (5)(d), encompasses several different degrees and also includes several types of offenses that were not previously included within the former "rape" statute [Fla.Stat. §794.01 (2) (1973)]. For example included within sexual battery is §794.011 (4)(f) involving a victim who is "mentally defective", but that situation was not covered by "rape" but was proscribed by a separate statute [Fla.Stat. §794.06 (1973)]. Likewise the sexual battery encompassed in §794.011 (4)(a), (c), and (e), were not included within the former rape. Also, left in doubt by the Florida Supreme Court's judicial adoption of sexual battery into §921.141 (5)(d) is whether every degree of sexual battery encompassed by §794.011 was intended by the Florida Supreme Court to form the basis of an underlying felony for §(5)(d); that is, a sexual battery with slight force the type of serious felony designed or intended to fall within the serious felonies listed in §921.141 (5)(d).

The Florida Supreme Court has not clarified the scope of its judicial adoption of sexual battery into the §(5)(d) aggravating circumstance. Aggravating circumstances constitutionally must be specific and detailed in order to avoid arbitrary application of the death sentence. The adoption of sexual battery without further definition by the Florida Supreme Court fails to guide and channel sentencing discretion. Since such further definition of this judicially adopted aggravating circumstance has not been provided by the Florida Supreme Court, this judicial adoption constitutes such a broad and vague construction as to violate the Eighth and Fourteenth Amendments. See Godfrey v. Georgia, 446 U.S. 420 (1980).

Thus, this Court should grant certiorari in the present case to review the significant constitutional question of whether this aggravating circumstance is vague and overbroad. The present case is appropriate for resolution of this issue since it is squarely presented, because it involves the propriety of petitioner's death sentence, and is likely to arise again.

3. The automatic exemption, on request of mothers with children from jury service.

The Supreme Court of Florida upheld the constitutionality of an automatic exemption , upon request, of mothers with children from jury service. The federal constitutional issue is whether this exemption denied petitioner his Sixth Amendment right to a cross-section of the community of his jury. This case is proper for review on certioari because it involves a significant constitutional question not previously addressed by this Court.

Subsequent to the decision in this case, the Florida Supreme Court struck down the statute in question. Alachua County Court Executive, Et. Al. v. Kirk Anthony Alachua County Juror No. 006, ___So.2d___, Case No. 61,209, Opinion filed July 29, 1982, 1982 FLW 347 (Fla. 1982). In striking down this statute, the Florida Supreme Court stated,

> "Although section 40.13 (4) is not being challenged in this proceeding on sixth amendment grounds, we note that courts look with disfavor on broadly drawn automatic exemptions from jury service. In Duren v. Missouri, 439 U.S. 357 (1979), the United States Supreme Court declared unconstitutional an exemption available upon request to all women because of their important role in the home and family life. In Lee v. Missouri,439 U.S. 461 (1979), the Court ordered that the Duren decision be retroactively applied to all juries sworn after the 1975 ruling in Taylor v. Louisiana, 418 U.S. 522 (1975), which set out the basic constitutional guidelines for jury selection. Id.

Thus, the question left open by the Florida Supreme Court is whether this statute is also unconstitutional on Sixth Amendment grounds. It clearly is.

Every criminal defendant has the right to a fair cross-section of the community on his jury under the Sixth and Fourteenth Amendments. Taylor v. Louisiana, 419 U.S. 522(1975). A fair

representation of women is part of that constitutional right. Taylor v. Louisiana, supra. In Duren v. Missouri, 439 U.S. 357 (1979) this Court clearly held that a sexually based exemption, on request, is unconstitutional, if not rationally based, as denying a defendant the right to a fair cross-section of the community. In Duren, the Court held unconstitutional a Missouri law which allowed all women to exclude themselves, on request, when men could only claim such a privilege if over 65.

In Florida any expectant mother or mother of a child under 15 years of age may be exempted from jury duty upon request. 340101(1), Fla.Stat. (1977). While the United States Supreme Court has recognized that the State has an appropriate interest in assuring that family members are able to perform child care duties, the means of achieving this must not deny a defendant his right to a fair cross-section of the community. 99 S.Ct. at 671.

The exemption at issue is both under-inclusive and over-inclusive and thus unnecessarily deprives defendants of their right to a fair cross-section of the community. The statute is under-inclusive because it only exempts the mothers of young children. The fathers of small children, who have child care responsibilities, have no similar exemption. This is a sex-based exclusion which has no rational relation to any state interest. If the State is going to assert its interest in responsible child-care, it must assert it equally in favor of women and men who have child care responsibilities since such sex discrimination is forbidden by our Constitution.

This exemption is also over-inclusive because it allows all women with young children to exempt themselves whether they have child-care responsibilities or not. Many women with children under 15 have no child-care responsibilities. Their children may be in school, in day-care centers or may be taken care of by relatives. Yet, these women may excuse themselves without any showing of a need to perform child-care duties. Thus, this exemption is also over-inclusive and unnecessarily excludes women from the jury pool; thus unnecessarily denying Petitioner a fair cross-section of the community in violation of the Sixth and Fourteenth Amendments.

This issue was raised in state court and was directly passed on by the Florida Supreme Court. In Harlin v. Missouri, 439 U.S. 459 (1979) this Court held that, even though the petitioner's Sixth Amendment claim had not been raised in a timely fashion in the trial court, it would review the case because the Missouri Supreme Court had reached the issue. Thus, in Lee v. Missouri, supra, this Court held that the ruling in Duren, supra applied retroactively to all cases where the jury was picked subsequent to Taylor, supra.

Accordingly, this Court should grant certioari in the present case to decide whether the automatic exemption, upon request of mothers with children, is violative of the Sixth Amendment. This case is appropriate for resolution because the Supreme Court of Florida directly passed on this issue.

CONCLUSION

The Petition for the Writ of Certioari to the Supreme Court of Florida should be granted.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

BY Richard B. Greene
RICHARD B. GREENE
Assistant Public Defender

82-5305

CASE NO. A-52

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JAMES ERNEST HITCHCOCK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIOARI TO THE SUPREME COURT OF FLORIDA

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datum Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

RICHARD B. GREENE
Assistant Public Defender

Counsel for Petitioner

James Ernest HITCHCOCK, Appellant,

v.

STATE of Florida, Appellee.

No. 51108.

Supreme Court of Florida.

Feb. 25, 1982.

Rehearing Denied May 27, 1982.

Defendant was convicted before the Circuit Court, Orange County, Maurice M. Paul, J., of murder in the first degree and was sentenced to death, and he appealed. The Supreme Court held that: (1) trial court did not improperly restrict defendant's presentation of evidence that allegedly corroborated defense theory; (2) evidence was sufficient to allow State to take case to jury on theories of both premeditation and felony-murder; (3) error in reserving ruling on motion for judgment of acquittal presented at close of State's case on felony-murder was harmless; (4) nothing even hinted that trial court imposed death penalty because defendant chose to have jury trial; and (5) trial judge properly assessed aggravating and mitigating factors.

Affirmed.

McDonald, J., filed an opinion concurring in part and dissenting in part in which Overton, J., joined.

1. Criminal Law ⇐1170½(2)

When questions were answered before State had time to object and answers were not stricken, defendant could not complain because, even if sustaining objection was error, witness' answers cured any error.

2. Criminal Law ⇐670

Person seeking admission of testimony must demonstrate why sought after testimony is relevant.

3. Criminal Law ⇐384

Excluded testimony regarding defendant's conduct around children and his relationship with his brother, the murder victim's father, was so remote and so slightly probative of any relevant issue that trial court properly excluded testimony in its discretion.

4. Criminal Law ⇐384

Testimony of family members who were to be called to establish that defendant's brother, the father of the murder victim, had a violent nature and a reputation for violence was properly excluded since such testimony could have been relevant only to show brother's alleged bad acts and violent propensities and since testimony was too remote to be relevant as proof that brother committed murder.

5. Criminal Law ⇐661

A defendant has right to present witnesses in his own defense but must comply with established rules of procedure and evidence designed to assure both fairness and reliability.

6. Witnesses ⇐344(2)

Evidence of particular acts of misconduct cannot be introduced to impeach credibility of a witness; for impeachment purposes, only proper inquiry into witness' character goes to reputation for truth and veracity.

7. Criminal Law ⇐864

As a general rule, it is error for a judge to respond to jury's question without parties being present and having opportunity to discuss request.

8. Criminal Law ⇐1174(5)

Although record was silent as to whether parties were present during exchange of notes in which jury asked whether they had to recommend death penalty or life at this time and judge answered that jury should not consider any penalty at this time but only guilt or innocence, defendant failed to demonstrate anything more than harmless error regarding notes, which were marked as being filed in open court. West's F.S.A. Rules Crim.Proc., Rule 3.410.

9. Jury ⇐33(1.2)

Exclusion of mothers with young children from jury service does not infringe

upon a defendant's right to a jury composed of fair cross section of the community. West's F.S.A. § 40.01.

10. Criminal Law ⇐1144.17

Judgment of conviction comes to Supreme Court with presumption of correctness, and claim of insufficient evidence cannot prevail if substantial competent evidence supports verdict.

11. Criminal Law ⇐1159.1

When it is shown that jurors have performed their duty faithfully and honestly and have reached reasonable conclusion, more than difference of opinion as to what evidence shows is required for Supreme Court to reverse.

12. Homicide ⇐282

Evidence, which included defendant's prior statement that he choked victim while still in her bedroom and then carried her outside where he choked her again and beat her until she was quiet, and from which jury could find that sexual battery was committed on victim by force and against her will, was sufficient to allow State to take case to jury on theories of both premeditation and felony-murder.

13. Criminal Law ⇐753.2(8), 1168(5)

Trial court should not reserve ruling on motions for judgment of acquittal presented at close of State's case but error in reserving ruling on felony-murder aspect of case until defense concluded its presentation was harmless where factual basis supported felony-murder theory, where defense treated partial reservation as denial, as it should have, and where it did not appear that defense could or would have proceeded in different manner regarding felony-murder theory even if court had not reserved ruling.

14. Criminal Law ⇐986.2(6)

Where judge agreed only to consider sentence of life imprisonment if defendant were to plead guilty, defendant refused to consider plea, and nothing even hinted that trial court imposed death penalty because defendant chose to have jury trial, trial court did not impose death penalty because defendant exercised his right to jury trial.

15. Criminal Law ⇐1208.1

Since statutory language setting out aggravating factors to be considered in determining propriety of death sentence limits aggravating factors to those listed, there is no reason to require state to notify defendants of aggravating factors that state intends to prove. West's F.S.A. § 921.141(5).

16. Homicide ⇐354

Consideration of aggravating factors that murder was committed in course of involuntary sexual battery and that murder was especially heinous, wicked or cruel were amply supported and thus factors were properly considered by trial court in sentencing defendant to death. West's F.S.A. § 921.141.

17. Homicide ⇐354

In view of defendant's postarrest statement stating that he choked and beat victim to make her be quiet and to keep her from telling her mother about sexual intercourse, murder to eliminate a witness was properly considered in aggravation following defendant's murder conviction. West's F.S.A. § 921.141(5).

18. Homicide ⇐354

Where at time of murder defendant was on parole from Arkansas, trial judge would have been justified in finding additional aggravating circumstance of being under sentence of imprisonment following defendant's murder conviction but failure to consider this aggravating circumstance did not impair validity of death sentence imposed where both jury and judge found sufficient aggravating factors to outweigh any mitigating evidence. West's F.S.A. § 921.141.

19. Homicide ⇐354

Testimony that as a child, defendant had once "sucked on gas" and that afterwards his mind seemed to wander occasionally, and that he had been drinking heavily and smoking marijuana prior to committing crime, was not sufficiently compelling to cause mitigation of death sentence imposed

following murder conviction. West's F.S.A. § 921.141(5).

20. Criminal Law ⇐1206(1)

Rape portion of death penalty statute was not so vague and confusing as to be unconstitutional on theory that crime of "rape" no longer exists in Florida, especially where trial judge substituted words "sexual battery" for rape in charge in listing aggravating factors, where trial judge defined involuntary sexual battery during guilt or innocence charge, and where defendant's conduct in case conformed to definition. West's F.S.A. §§ 794.011 et seq., 921.141(5)(d); F.S.1973, § 794.01(2).

21. Criminal Law ⇐13.1(1)

A statute is void for vagueness if it fails to give person of ordinary intelligence fair notice that contemplated conduct is forbidden but, on the other hand, statute is not void if its language conveys sufficiently definite warning as to proscribed conduct when measured by common understanding and practices.

22. Criminal Law ⇐966.1

Where after jury returned its verdict convicting defendant of murder, defense counsel asked for time to prepare for sentencing and was given a week for that purpose, but at sentencing defense presented only one witness, it appeared that defense itself chose to limit presentation and thus defendant was not improperly limited in presenting mitigating evidence. West's F.S.A. § 921.141.

Richard L. Jorandby, Public Defender, Craig S. Barnard, Chief Asst. Public Defender and Richard B. Greene, Asst. Public Defender, West Palm Beach, for appellant.

Jim Smith, Atty. Gen. and Robert L. Boger, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

James Ernest Hitchcock appeals his conviction of murder in the first degree and sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla.Const.

A jury convicted Hitchcock of first-degree murder for the death of his brother's thirteen-year-old stepdaughter under an indictment charging one count of premeditated murder. After weighing the aggravating and mitigating factors, the trial court agreed with the jury's recommendation and imposed the death sentence. We affirm both the conviction and sentence.

Unemployed, ill, and with no place to live, Hitchcock moved in with his brother Richard and Richard's family two to three weeks before the murder. On the evening of the murder, appellant watched television with Richard and his family until around 11:00 p. m. He then left the house and went into Winter Garden where he spent several hours drinking beer and smoking marijuana with friends.

According to a statement Hitchcock made after his arrest, he returned around 2:30 a. m. and entered the house through a dining room window. He went into the victim's bedroom and had sexual intercourse with her. Afterwards, she said that she was hurt and was going to tell her mother. When she started to yell because he would not let her leave the bedroom, Hitchcock choked her and carried her outside. The girl still refused to be quiet so appellant choked and beat her until she was quiet and pushed her body into some bushes. He then returned to the house, showered, and went to bed.

At trial Hitchcock repudiated his prior statement. He testified that the victim let him into the house and consented to having intercourse. Following this activity, his brother Richard entered the bedroom, dragged the girl outside, and began choking her. She was dead by the time appellant got Richard away from her. When Richard told him that he hadn't meant to kill her, Hitchcock told him to go back inside and that he, the appellant, would cover up for his brother. According to Hitchcock, he gave his prior statement only because he was trying to protect Richard.

On appeal, Hitchcock raises numerous points which will be addressed in order of presentation to this Court.

I. In his first point, Hitchcock claims that the trial court improperly restricted his presentation of evidence corroborating his defense theory, his impeachment of a key prosecution witness, and his explanation of his false "confession." An examination of the record does not reveal that the trial judge committed error as Hitchcock alleges.

[1] Defense counsel called the defendant and a series of Hitchcock's relatives—a brother and his wife, several sisters, and Hitchcock's mother—to the stand, asking each essentially the same questions, specifically, details of the defendant's conduct around children, the early lives of the two brothers, and whether Richard Hitchcock had ever exhibited violent tendencies. The state objected successfully to most of such questions on the grounds of immateriality and irrelevance.[1]

[2, 3] The person seeking admission of testimony must demonstrate why sought-after testimony is relevant. *See Hauger v. State*, 83 Fla. 41, 90 So. 312 (1922). Hitchcock has presented nothing to show that he made a clear offer of proof which would overcome the state's objections. We find the excluded testimony regarding Hitchcock's conduct around children and his relationship with Richard so remote and so slightly probative of any relevant issue that the trial judge, in his discretion, could properly exclude the testimony.

[4] The testimony of family members who would be called to establish that Richard Hitchcock had a violent nature and a reputation for violence was also properly excluded. The trial court found the proffered testimony irrelevant and refused to admit it. Appellant claims this evidence would impeach Richard and would tend to prove his substantive defense that Richard, not the appellant, committed the murder.

[5, 6] A defendant has the right to present witnesses in his own defense but must comply with established rules of procedure and evidence designed to assure both fairness and reliability. *See Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Evidence of particular acts of misconduct cannot be introduced to impeach the credibility of a witness. *Fulton v. State*, 335 So.2d 280 (Fla.1976). For impeachment purposes the only proper inquiry into a witness' character goes to reputation for truth and veracity. *Pandula v. Fonseca*, 145 Fla. 396, 199 So. 358 (1940). The excluded testimony could have been relevant only to show Richard Hitchcock's alleged bad acts and violent propensities and, thus, was properly excluded for impeachment purposes. Nor is there merit to appellant's claim that the testimony concerning Richard's character would tend to prove that Richard committed the murder. The testimony offered in the instant case was too remote to be relevant.

[7] II. Hitchcock's next point concerns the trial court's communication with the jury during its deliberations. As a general rule, it is error for a judge to respond to a jury's question without the parties being present and having the opportunity to discuss the request. *Ivory v. State*, 351 So.2d 26 (Fla.1977).

[8] In the instant case, the jury sent the following note to the judge: "Is it required for us to recommend death penalty or life at this time?" Because the jury was then deliberating on guilt or innocence, the judge wrote back: "You should not consider any penalty at this time—only guilt or innocence." These notes are marked as being filed in open court, but the record is silent as to whether or not the parties were present during this exchange. This communication does not fall within the scope of Florida Rule of Criminal Procedure 3.410, and Hitchcock has failed to demonstrate anything more than harmless error regarding this point.

1. Numerous questions were answered before the state had time to object and those answers were not stricken. In such instance, a defendant cannot complain because, even if sustaining the objection were error, the witness' answer cured any error. *Childers v. State*, 74 Fla. 288, 77 So. 99 (1917).

[9] III. Hitchcock also contends that the exemption, on request, of mothers with young children from jury service denied his right to a jury drawn from a fair cross-section of the community.[2] In *McArthur v. State*, 351 So.2d 972 (Fla.1977), this Court held that mothers with young children do not comprise a constitutionally significant class.[3] Excluding such women, therefore, does not infringe upon a defendant's right to a jury composed of a fair cross-section of the community.

Hitchcock cites *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), to support his contention. *Duren* held unconstitutional a Missouri statute which, upon request, exempted *all* women from jury service. Section 40.01, Florida Statutes (1975), on the other hand, provides only a limited exemption, and we find nothing in *Duren* which makes it necessary to recede from the Court's previous rulings on this issue.

IV. As his fourth point on appeal, Hitchcock challenges the sufficiency of the evidence to convict him of first-degree murder. He alleges that the evidence presented was insufficient to show either premeditation or felony murder.

[10, 11] A judgment of conviction comes to this Court with a presumption of correctness, and a claim of insufficiency of the evidence cannot prevail if substantial competent evidence supports the verdict. *Spinkellink v. State*, 313 So.2d 666 (Fla. 1975), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). Furthermore, when it is shown that the jurors have performed their duty faithfully and honestly and have reached a reasonable conclusion, more than a difference of opinion as to what the evidence shows is required for this Court to reverse them. *Alvord v. State*, 322 So.2d 533 (Fla.1975), *cert. denied*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). At trial, Hitchcock testified that the girl consented to intercourse, that his brother Richard discovered them, and that Richard strangled the girl. The jury, however, also heard Hitchcock's prior statement that he choked the girl while still in her bedroom and then carried her outside where he again choked and beat her until she was quiet and finally hid her body in some bushes.

[12] It is well settled that the credibility of witnesses and the weight to be given testimony is for the jury to decide. *Coco v. State*, 80 So.2d 346 (Fla.), *cert. denied*, 349 U.S. 931, 75 S.Ct. 774, 99 L.Ed. 1261, *cert. denied*, 350 U.S. 828, 76 S.Ct. 57, 100 L.Ed. 739 (1955). Choking the girl, taking her outside, and then choking her again—all to make her be quiet—is substantial evidence to have supported a finding of premeditation. In addition, the total circumstances, including the time of night, entry through a window, the victim's tender years, and medical testimony that the child was of previously chaste character, refuted Hitchcock's claim of consent and could be a basis to find that the sexual battery was committed on the victim by force and against her will, thus warranting the instruction on felony murder. Under these circumstances, the jury could easily have considered Hitchcock's contention that the girl consented to have been unreasonable. *See Conner v. State*, 106 So.2d 416 (Fla.1958).

We hold, therefore, that the evidence was sufficient to allow the state to take the case to the jury on theories of both premeditation and felony murder.

[13] V. At the close of the state's evidence, Hitchcock moved for a judgment of acquittal, claiming insufficiency of the evidence to show either premeditation or felony murder. The trial court denied the motion as to premeditation but reserved ruling on the felony aspect until the defense concluded its presentation.[4] Defense counsel renewed the motion for acquittal, which the judge denied, at the close of testimony.

2. We note that one female juror in this case had a child younger than 15 years and, thus, was eligible for exemption from jury service.

3. We repeated this holding in *Vasil v. State*, 374 So.2d 465 (Fla.1979).

4. Defense counsel failed to object when the judge announced that he would reserve ruling on the felony-murder portion of the motion.

Hitchcock now claims that reserving ruling on the felony evidence prejudiced him by forcing him to proceed with his defense without knowing whether the question of felony murder would go to the jury. To support his claim that the partial reservation was error, Hitchcock cites *Adams v. State*, 192 So.2d 47 (Fla. 1st DCA 1966), and *State v. Rolle*, 202 So.2d 867 (Fla. 2d DCA 1967). Both *Adams* and *Rolle* declared such reservation to be error. We agree and hold that trial courts should not reserve ruling on motions for judgment of acquittal presented at the close of the state's case. Under the circumstances of this case, however, the error was harmless.

Since the motion was not granted, however, it could and should have been considered denied. Because a factual basis supported the felony-murder theory, the partial reservation was harmless and did not prejudice the defendant. Hitchcock testified that the victim consented to having intercourse. This testimony constituted the defense's only evidence to rebut felony murder[5] and shows that the defense, as it should have, treated the partial reservation as a denial. Since the victim of the sexual battery was dead, it does not appear that the defense could or would have proceeded in a different manner regarding the felony-murder theory even if the court had not reserved ruling on the motion for acquittal.

[14] VI. Hitchcock also claims that the trial court offered him a sentence of life imprisonment in return for a plea of nolo contendere as charged. He concludes that the court imposed the death penalty because he exercised his right to a jury trial.

Hitchcock's version of the facts surrounding this point, however, is not supported. Rather, it appears from the record, as supplemented, that the judge agreed only to consider such an agreement if Hitchcock were to plead guilty. Because Hitchcock refused to consider a plea, the court never had to consider whether to accept the plea bargain. When defense counsel reminded the judge during sentencing proceedings of the plea negotiations, the judge responded, "there was never any understanding because your client didn't want to consider any plea." There is nothing in the record even hinting that the trial court imposed the death penalty because Hitchcock chose to have a jury trial. Instead, as shown in the court's findings of fact, the evidence supports the propriety of the death sentence in this case.

[15] VII. Hitchcock also argues that his conviction and sentence must be overturned because, prior to trial, he had no notice of the aggravating circumstances that the state intended to show and on which the judge and jury relied. This contention is without merit. *Menendez v. State*, 368 So.2d 1278 (Fla.1979). *See Clark v. State*, 379 So.2d 97 (Fla.1979); *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).

Section 921.141(5), Florida Statutes (1975), sets out the aggravating factors to be considered in determining the propriety of the death sentence. The statutory language limits aggravating factors to those listed. *Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). Thus, there is no reason to require the state to notify defendants of the aggravating factors that the state intends to prove.

[16] VIII. In his final point on appeal, Hitchcock alleges numerous infirmities in his sentencing. First, he claims the trial judge improperly assessed the aggravating and mitigating factors. The court found three aggravating circumstances: the murder was committed in the course of an involuntary sexual battery; the purpose of the murder was to eliminate a witness in order to avoid arrest; and the murder was especially heinous, wicked, or cruel.

5. Defense did not try to refute the medical testimony that the victim had engaged in intercourse. Hitchcock's only defense to the underlying felony, therefore, rested on the victim's consent.

[17, 18] After reviewing the record, we find the consideration of these aggravating factors amply supported. Regarding the felony-murder aggravating circumstance, the judge stated that the record did not substantiate Hitchcock's assertion that the girl consented to the admitted sexual intercourse. As determined earlier in this opinion, the totality of the evidence supported the felony-murder instruction, and this first circumstance was properly considered. In his post-arrest statement Hitchcock said that he choked and beat the child to make her be quiet and to keep her from telling her mother. In view of proof this strong, murder to eliminate a witness is properly considered in aggravation. *See Riley v. State*, 366 So.2d 19 (Fla.1978). The trial judge did not elaborate on his finding that the murder was especially heinous, wicked, or cruel, but that finding is supported by the facts of this case.[6]

[19] The judge found only one mitigating factor, Hitchcock's age (20 years). Hitchcock now contends that the court erroneously failed to find that he suffered from extreme mental and emotional disturbance, that he was under extreme duress or the domination of another person, and that his capacity to appreciate the criminality of his conduct was substantially impaired. This claim, however, is not supported by the evidence. During the sentencing phase, defense presented only one witness, one of Hitchcock's brothers. In an attempt to mitigate the possible sentence, this brother testified that, as a child, Hitchcock had once "sucked on gas" and that afterwards his mind seemed to wander occasionally. During the guilt phase, Hitchcock testified that he had been drinking heavily and smoking marijuana prior to committing the crime. Apparently neither the jury nor the judge found this testimony sufficiently compelling to cause mitigation of the sentence. We do not find differently. *Compare Hargrave v. State*, 366 So.2d 1 (Fla.1978), *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979), and *LeDuc v. State*, 365 So.2d 149 (Fla.1978), *cert. denied*, 444 U.S. 88, 100 S.Ct. 175, 62 L.Ed.2d 714 (1979), *with Burch v. State*, 343 So.2d 831 (Fla.1977), and *Jones v. State*, 332 So.2d 615 (Fla.1976).

[20, 21] In his second sentencing challenge, Hitchcock claims that the rape portion of section 921.141(5)(d) is so vague and confusing as to be unconstitutional because the crime of "rape" no longer exists in this state.[7] The trial judge substituted the words "sexual battery" for rape in his charge to the jury in listing the aggravating factors. In his charge to the jury during the initial phase of the trial, the trial judge defined involuntary sexual battery. The former definition of rape, "ravishes or carnally knows a person of the age of eleven years or more by force and against his or her will," section 794.01(2), Florida Statutes (1973), was substantially included therein. The defendant's conduct in this case conformed to this definition. *See Adams v. State*, 412 So.2d 85 (Fla.1982). A statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice that contemplated conduct is forbidden. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). On the other hand, a statute is not void if its language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *United States v. Petrillo*, 332 U.S. 1, 8, 67 S.Ct. 1538, 1542, 91 L.Ed. 1877

6. We note that the trial court would have been justified in finding an additional aggravating circumstance. At the time of the murder Hitchcock was on parole from Arkansas, and being on parole has been construed as being under sentence of imprisonment. *Aldridge v. State*, 351 So.2d 942 (Fla.1977), *cert. denied*, 439 U.S. 882, 99 S.Ct. 220, 58 L.Ed.2d 194 (1978). *See also Peek v. State*, 395 So.2d 492 (Fla.1980). The failure to consider this aggravating circumstance, however, does not impair the validity of the death sentence imposed here because both the jury and the judge found sufficient aggravating factors to outweigh any mitigating evidence.

7. Ch. 74-121, Laws of Florida, amended ch. 794, Fla.Stat., to replace the former rape statute with the crime of sexual battery. *See* § 794.011, Fla.Stat. The word "rape" in § 921.141(5)(d) has not yet been changed to "sexual battery."

(1947). Accordingly, we find no merit to appellant's contention on this point.

[22] Hitchcock next claims that section 921.141 unconstitutionally limits the consideration of mitigating factors and that he was improperly limited in presenting mitigating evidence. Again, we find no merit to these contentions. As stated in *Songer v. State*, 365 So.2d 696 (Fla.1978), *cert. denied*, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1063 (1979), "all relevant circumstances may be considered in mitigation, and ... the factors listed in the statute merely indicate the principal factors to be considered." 365 So.2d at 700. After the jury returned its verdict, defense counsel asked for time to prepare for sentencing and was given a week for that purpose. At sentencing, however, defense presented only one witness. There is nothing in the record indicating that the trial judge limited the defense's presentation. Rather, it appears that the defense itself chose to limit that presentation.

Hitchcock's final claims—that section 921.141 is unconstitutional on its face, that the death penalty is inconsistently applied, and that there are no standards for weighing aggravating and mitigating factors—have been discussed elsewhere. *See Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Alvord v. State*, 322 So.2d 533 (Fla.1975), *cert. denied*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976); *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

The conviction and sentence are affirmed.

It is so ordered.

SUNDBERG, C. J., and ADKINS, BOYD and ALDERMAN, JJ., concur.

McDONALD, J., concurs in part and dissents in part with an opinion, in which OVERTON, J., concurs.

McDONALD, Justice, concurring in part and dissenting in part.

I would affirm the conviction in this cause but would reduce the sentence to life imprisonment or at least grant Hitchcock a new sentencing hearing.

I am not satisfied that Hitchcock received the benefit of all mitigating circumstances available to him. A person can know right from wrong and therefore be responsible for his actions but at the same time have impaired judgment and inability to conform his behavior to the requirements of law. This latter situation presents mitigating circumstances as to his sentencing. § 921.141(6)(f), Fla.Stat. (1975).

In this case there was testimony that from childhood Hitchcock's mind had not been entirely normal. Prior to the commission of this crime Hitchcock had been drinking heavily and smoking marijuana. Returning from his "night on the town," he entered the bedroom of the thirteen-year-old victim and engaged in sex with her. When she announced that she had been hurt and was going to tell her mother he reacted impulsively. From the record I can discern no basis for the jury or the trial judge's failure to find that the defendant committed this crime while under the influence of extreme mental or emotional disturbance or that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Certainly his actions fall far short of showing a reasoned planning or reasoned knowledge of what he was doing when he strangled the victim.

I further do not feel that finding the aggravating factor of especially heinous, atrocious, or cruel was proper. This crime was not accompanied by such additional acts as to set the crime apart from the norm. It did not show a conscienceless or pitiless crime which is unnecessarily torturous to the victim. The test of cruel and heinous simply is not met in this case. *See Cooper v. State*, 336 So.2d 1133 (Fla.1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977); *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). *See also Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

Supreme Court of Florida

THURSDAY, MAY 27, 1982

JAMES ERNEST HITCHCOCK, Appellant, v. STATE OF FLORIDA, Appellee.	CASE NO. 51,108 Circuit Court No. 76-1942 Div. "D" (Orange)

Upon consideration of the Motion for Rehearing filed in the above cause by attorney for Appellant, and response thereto,

IT IS ORDERED that said Motion be and the same is hereby denied, and it is further

ORDERED that Appellant's Application for Stay of Judgment and Mandate is hereby granted and proceedings in this Court and in the Circuit Court of the Ninth Judicial Circuit, in and for Orange County, Florida are hereby stayed to and including June 28, 1982, to allow Appellant to seek review in the Supreme Court of the United States and obtain any further Stay from that Court.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Sonya Carroll
Deputy Clerk

TC
cc: Hon. W. D. Gorman, Clerk
Hon. Maurice M. Paul, Judge

Craig S. Barnard, Esquire
Robert L. Bogen, Esquire

CHAPTER 40

JURORS AND JURY LISTS

40.01 Qualifications and disqualifications of jurors.—

(1) Grand and petit jurors shall be taken from the male and female persons at least 18 years of age, who are citizens of this state and who have resided in this state for 1 year and in their respective counties for 6 months, and who are fully qualified electors of their respective counties; however, expectant mothers and mothers with children under 15 years of age, upon their request, shall be exempted from grand and petit jury duty.

(2) No person who shall have been convicted of bribery, forgery, perjury, or larceny within this state or under the laws of any other state, government or country, or who shall have been convicted within this state of a felony, or under the laws of any other state, government or country of a crime which, if committed within this state, would be a felony, shall be qualified to serve as a juror unless restored to civil rights.

(3) In the selection of jury lists only such persons as the selecting officers know, or have reason to believe, are law-abiding citizens of approved integrity, good character, sound judgment and intelligence, and who are not physically or mentally infirm, shall be selected for jury duty.

(4) Where in the laws of Florida pertaining to jurors and the preparation of jury lists reference is made to male persons, such reference shall in each instance be taken and construed to mean male and female persons.

(5) Wherever jurors are required by law or by order of court, to be kept together during the conduct of a trial, or while considering their verdict, or whenever by order of court lodging is required to be furnished juries, separate lodging and rest room facilities shall be provided for jurors of different sexes, and under contemplation of law jurors shall be deemed to have been kept together whenever the jurors of different sexes occupy the accommodations provided for their respective sexes.

(6) Whenever female persons are sitting on any jury, and it becomes necessary that said jurors be committed to the charge of an officer, a female bailiff or deputy sheriff shall be provided to attend said jury in addition to the male officer to whom such juries are customarily committed, and all existing laws relating to the powers, duties and obligations of such male officer shall apply with like force and effect to such female officer.

History.—s. 2, ch. 6915, 1901; ss. 1, 2, ch. 4122, 1903; GS 1870, 1871; s. 1, ch. 6831, 1913; RGS 2771, 2772; ss. 1, 2, ch. 12966, 1927; CGL 4443, 4444; s. 2, ch. 23120, 1945; ss. 1, chs. 28814, 28841, 28848, 1953; ss. 1, 2, ch. 67-154; s. 1, ch. 76-78.

40.015 Jury districts; counties exceeding 50,000.—

(1) In any county having a population exceeding 50,000 according to the last state or federal census and one or more locations in addition to the county seat at which the county or circuit court sits and holds jury trials, the Board of County Commissioners, upon the request of a majority of the circuit court judges of the circuit in which the county is located, is authorized to create a jury district for each court house location from which jury lists shall be selected in the manner presently provided by law.

(2) In determining the boundaries of a jury district to serve the court located within the district, the board shall seek to avoid any exclusion of any cognizable group. Each jury district shall include at least 6,000 registered voters.

History.—s. 1, ch. 76-114.

CHAPTER 921

SENTENCE

921.09 Fees of physicians who determine sanity at time of sentence.—The court shall allow reasonable fees to physicians appointed by the court to determine the mental condition of a defendant who has alleged insanity as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 258, ch. 19554, 1939; CGL 1940 Supp. 9663.264; s. 121, ch. 70-339.

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.—The court shall allow reasonable fees to the physicians appointed to examine a defendant who has alleged her pregnancy as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 258, ch. 19554, 1939; CGL 1940 Supp. 9663.267; s. 122, ch. 70-339.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose

sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 237.o, ch. 19554, 1939; CGL 1940 Supp. 8683-240; s. 119, ch. 70-339; s. 1, ch. 72-72; s. 9, ch. 72-724; s. 1, ch. 74-379; s. 249, ch. 77-104; s. 1, ch. 77-174.

State.—Forms, § 919.23.

921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement.—

(1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has pleaded guilty or nolo contendere to any crime, the sentencing court shall permit the victim of the crime for which the defendant is being sentenced to:

(a) Appear before the sentencing court for the purpose of making a statement under oath for the record; or

(b) Submit a written statement under oath to the office of the state attorney, which shall be filed with the sentencing court.

(2) The state attorney or any assistant state attorney shall advise all victims that statements, whether oral or written, shall relate solely to the facts of the case and the extent of any injuries, financial losses, and loss of earnings directly resulting from the crime for which the defendant is being sentenced.

(3) The court may refuse to accept a negotiated plea and order the defendant to stand trial.

History.—ss. 9, 10, ch. 78-271.

921.15 Stay of execution of sentence to fine; bond and proceedings.—

(1) When a defendant is sentenced to pay a fine, he shall have the right to give bail for payment of the fine and the costs of prosecution. The bond shall be executed by the defendant and two sureties approved by the sheriff or the officer charged with execution of the judgment.

(2) The bond shall be made payable in 90 days to the governor and his successors in office.

(3) If the bond is not paid at the expiration of 90 days, the sheriff or the officer charged with execution of the judgment shall indorse the default on the bond and file it with the clerk of the court in which the judgment was rendered. The clerk shall issue an execution as if there had been a judgment at law on the bond, and the same proceedings shall be followed as in other executions. After default of the bond, the convicted person may be proceeded against as if bond had not been given.

History.—s. 280a, ch. 19554, 1939; CGL 8426, 8427; CGL 1940 Supp. 8683-279; s. 123, ch. 70-339.

921.16 When sentences to be concurrent and when consecutive.—A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits, shall serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall be served consecutively unless the court directs that two or more of the sentences be served concurrently.

History.—s. 281, ch. 19554, 1939; CGL 1940 Supp. 8683-271; s. 121, ch.

82-5305

CASE NO. A-52

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1981

JAMES ERNEST HITCHCOCK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, JAMES ERNEST HITCHCOCK, who is now imprisoned in the custody of the Florida Department of Corrections, asks to leave to file the accompanying Petition for Writ of Certiorari without pre-payment to Rule 46 of the Rules of this Court. Petitioner has proceeded in forma pauperis at all times in the state courts below. Petitioner has attached hereto his affidavit in substantially the form prescribed by Fed. Rules App. Proc., Form 4.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

BY Richard B. Greene
RICHARD B. GREENE
Assistant Public Defender

Counsel for Petitioner.

CASE NO. A-52

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1981

JAMES ERNEST HITCHCOCK,
Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

A F F I D A V I T

I, JAMES ERNEST HITCHCOCK, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the petitioner in the above-entitled case.

2. Because of my property I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

I was convicted of first degree murder and sentenced to death by the Circuit Court for Orange County, Florida. I appealed the judgment of conviction and the sentence of death to the Florida Supreme Court; that court affirmed the judgments and death sentences. I am now petitioning for a writ of certiorari to the Supreme Court of the United States.

_____

JAMES ERNEST HITCHCOCK

Duly witnessed and sworn to before me
this ____ DAY OF AUGUST, 1982.

_____

NOTARY PUBLIC

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

CASE NO. 82-5305

JAMES ERNEST HITCHCOCK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JIM SMITH
Attorney General
Tallahassee, FL 32304

ROBERT L. BOGEN
Assistant Attorney General
111 Georgia Avenue, Room 204
West Palm Beach, FL 33401
(305) 837-5062

Counsel for Respondent

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SUPREME COURT OF THE UNITED STATES

October Term, 1981

CASE NO. 82-5305

JAMES ERNEST HITCHCOCK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Respondent, the State of Florida, respectfully requests that this Court deny the instant Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is accurate, if somewhat brief. It consists of the "skeleton" of the trial, but neglects the "flesh and meat." Nonetheless, the statement is sufficient insofar as none of the issues raised by the petition directly relate to the evidence presented against Petitioner. However, Respondent would add the following:

1. Archie Sooter was indeed able to testify that Petitioner's character in regard to violence was "calm and jovial." (T 732). He was not precluded from testifying on behalf of Petitioner, as implied in the petition.

2. Martha Hitchcock did indeed testify with reference to the early background of Petitioner. Petitioner had left home at the age of 13; he did not have a natural father at that time (T 735-736). The defendant's natural father died when he was six years old (T 737). Martha Hitchcock further testified that she had never known Petitioner to be a violent person (T 737). Finally, Martha Hitchcock testified that Richard Hitchcock had made sexual advances toward her (T 737). Petitioner's inferences in his Petition for Writ of Certiorari to the contrary are not correct.

3. James Harold Hitchcock testified that he had never known Petitioner to exhibit any violence towards people, and that Petitioner acted in a playful manner with the witness' children, even having babysat for the children (T 739-740, 742, 743). Petitioner's inferences in his Petition for Writ of Certiorari to the contrary are incorrect.

4. Fay Hitchcock, the wife of James Harold Hitchcock, testified that she had never known Petitioner to exhibit any violence (T 744). Petitioner had never done anything violent towards her children, and has even babysat for her children (T 745). Petitioner's inferences to the contrary in his Petition for Writ of Certiorari are incorrect.

5. Petitioner states in his Statement of the Case that the trial judge imposed the death penalty after the jury recommended the same, even though the trial judge acknowledged that the judge and the prosecution had previously offered to Petitioner a life sentence in return for a guilty plea (which offer Petitioner declined). This statement is inaccurate. Nothing that occurred at trial bears out this statement. The Florida Supreme Court's opinion reflects the inaccuracy of this statement. In actuality, upon allocution, defense counsel responded in the negative to the question if there were any legal cause why sentence should not be pronounced.

When the defense attorney attempted to remind the court about an alleged prior plea agreement which Petitioner had rejected, the court explicitly stated that there was never any understanding because Petitioner did not want to consider any plea (TS 5-6).

SUMMARY OF ARGUMENT

I.

THE DEATH SENTENCE WAS NOT IMPROPERLY IMPOSED UPON PETITIONER AFTER A PLEA AGREEMENT OF LIFE IMPRISONMENT.

Petitioner misstates the facts. The trial court never offered a life sentence in return for a plea. The trial judge merely said that he would consider the prosecutor's recommendation if Petitioner pled, but Petitioner did not plead. The trial judge never agreed with the self-serving statement of Petitioner's counsel at the time of sentencing that there was an offer by the trial judge to impose life in return for a plea. To the contrary, the trial judge clearly stated that there was never any understanding, much less an offer or agreement.

In any event, the trial judge filed findings of fact which, without a doubt, affirmatively reflect that the imposition of the death penalty was premised upon the existence of statutory aggravating factors which out-weighed any mitigating factors. Having presided at both phases of the trial, the trial judge became privy to a great deal more information regarding appropriate considerations in deciding whether to impose the death penalty, than was available to him prior to this trial at the time of the alleged plea negotiations. Further, the jury had recommended a sentence of death. It wasn't the exercise of his right to a jury trial which weighed in the trial judge's mind. It was the facts and circumstances which were explicitly detailed in the jury trial, together with the jury's recommendation of

death, which weighed in the judge's mind.

In light of the above, it is apparent that Petitioner is doing nothing more than attempting to manufacture a factual scenario to support certiorari review by this Court. The issue may or may not be of significant constitutional dimension. But, in any event, the facts of the instant case do not support Petitioner's contentions in support of certiorari review.

II.

THE "RAPE" PORTION OF AGGRAVATING CIRCUMSTANCE 5(d) OF SECTION 921.141, FLA. STAT. (1977) IS NEITHER VAGUE NOR CONSTITUTIONALLY INVALID.

The aggravating factor at issue speaks in terms of "any rape." It is not dependent upon proof of violation of a particular statute during which the murder was committed, but is dependent upon proof of the felonious conduct identified by the crime specified (during which the murder occurred). In essence, it is the conduct, and not the actual violation of a particular statute proscribing the conduct, which supports the existence of the aggravating factor. Early on, in State v. Dixon, 283 So.2d 1 (Fla. 1973), the Florida Supreme Court viewed the legislative intent in promulgating the applicable aggravating factor, to include capital felonies committed as part of another dangerous and violent felony. It would therefore seem apparent that it is the felonious conduct which brings into play the existence of the aggravating circumstance in question.

In the case sub judice, although the aggravating circumstance specifies "rape," the trial court instructed the jury at the penalty phase of the proceedings on involuntary sexual battery (TAS 54). "Involuntary sexual battery" constitutes the same felonious conduct as "rape." Indeed, the law of rape in Florida was repealed in the same legislative act as that which created the law of sexual battery.

Chapter 74-121, Laws of Florida.

Petitioner cannot reasonably claim vagueness or lack of notice, not only for the reasons specified above, but also because the acts which he committed were in fact a traditional rape. The mere fact that the trial judge referred to this conduct as an involuntary sexual battery is of no avail to Petitioner. A rose by any other name is still a rose. There was no reason for Petitioner to suspect that his conduct fell outside the scope of the statute. Rose v. Locke, 423 U.S. 48, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975). Since the rape specified in the applicable aggravating factor is in fact an involuntary sexual battery, and Petitioner's conduct did indeed constitute a rape (or involuntary sexual battery), he is in no position to claim that the trial court used the term "involuntary sexual battery" rather than the term "rape," since the former term replaced the latter term. The two terms specify the same conduct, and said conduct was proven.

III.

PETITIONER WAS NOT DENIED HIS RIGHT TO A FAIR CROSS-SECTION OF THE COMMUNITY BY FLORIDA'S EXEMPTION, ON REQUEST, OF MOTHERS WITH CHILDREN, FROM SERVICE ON JURIES.

Petitioner was not denied his Sixth Amendment right to a cross-section of the community as potential jurors, indeed, the record reflects that Petitioner did not suffer from any application of the statute in question, inasmuch as at least one juror was a mother with children under 15 years of age (T 157; R 63). As such, Petitioner has clearly failed to demonstrate that he was harmfully affected by the particular feature of the statute which he claims would make the statute overbroad.

True, the Florida Supreme Court has recently held this statute to be a denial of equal protection to men with children under 15 years of age. See, Alachua County Court

Executive, et al. v. Kirk Anthony Alachua County Juror No. 006, ___ So.2d ___, Case No. 61,209, opinion filed July 29, 1982, 1982 Fla.L.W. 347 (Fla. 1982). However, that case related to a male juror's Fourteenth Amendment rights, not a criminal defendant's Sixth Amendment right.

Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), does nothing but favorably affect the reasoning espoused by the Florida Supreme Court in the case sub judice. Indeed, the statute in question does not deny a defendant of a jury constituting a fair cross-section of a community. Women of all ages must serve, as well as men of all ages.

In light of the fact that Petitioner's jury did indeed contain at least one woman with children under 15 years of age, and such a limited group, in any event, does not comprise a constitutionally significant class, this issue does not present a substantial federal question.

REASONS FOR DENYING THE WRIT

I.

THE DEATH SENTENCE WAS NOT IMPROPERLY IMPOSED UPON PETITIONER AFTER A PLEA AGREEMENT OF LIFE IMPRISONMENT.

Petitioner's factual premise is incorrect, and his contentions must consequently be rejected. The trial judge took part in no plea negotiations. The record reflects, and the Florida Supreme Court recognized in its opinion, that no understanding was ever reached as to an appropriate sentence should Petitioner enter a plea other than not guilty. While it may have been that Petitioner would only have entered a plea other than not guilty upon the condition that he be given a life sentence, no one, neither the trial judge nor the prosecutor, ever made any offer in this regard for, as the record reflects, Petitioner had steadfastly refrained from considering any plea.

At sentencing, when defense counsel attempted to remind the trial judge of the prior discussions with reference to the entry of a plea, the trial court explicitly stated that ". . . there was never any understanding, because your client didn't want to consider any plea." (TS 5-6). The trial judge never agreed with Petitioner's counsel's self-serving statement to the contrary. Further, Petitioner never objected to his sentence on the grounds of an alleged prior plea agreement; he merely reminded the court of the prior discussions, in mitigation. Indeed, Petitioner obviously did not feel that there was any impropriety in the sentence imposed in this regard, for there was no mention of this matter in Petitioner's Motion for New Trial as to sentencing proceeding (R 175). It is true, the Florida Supreme Court never reached the legal issues involved in the question as presented by Petitioner. What Petitioner ignores, however, is the fact that the reason the Florida Supreme Court never reached the legal issue was because there were no facts to support Petitioner's contentions with reference to the issue.

Regardless of the above, however, the record does indeed affirmatively reflect that the imposition of the death penalty was premised upon proper considerations, and not upon Petitioner's exercise of his right to a jury trial. Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), indicates that a death sentence must be, and must also appear to be, based on reason rather than caprice or emotion. Pursuant to Order of the Florida Supreme Court, commonly known as a "Gardner" Order (R 212-213), the trial judge issued an Order explicitly advising the Florida Supreme Court that, in determining the sentence imposed upon Petitioner, only information which came out in the trial (both phases), and known to both the State and the defendant, was in fact considered (R 214). Furthermore, in sentencing Petitioner (R 192-193),

the trial judge filed his findings of fact (R 194-198) which, without a doubt, affirmatively reflect that the imposition of the death penalty was premised upon the existence of statutory aggravating factors which outweighed any mitigating factors. The findings were spelled out. The findings reflect a keen awareness, by virtue of the trial court's presiding at both phases of the trial, of the facts surrounding the crime, and the applicability of numerous aggravating and mitigating circumstances. Thus, the record affirmatively reflects the basis for the imposition of the death penalty, and as such affirmatively reflects that the death penalty was not imposed upon Petitioner for exercising his right to a jury trial.

It must be beyond dispute that, having presided at both phases of the trial, the trial judge became privy to a great deal more information regarding appropriate considerations in deciding whether to impose the death penalty, than was available to him prior to this trial at the time of any alleged plea negotiations. North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), clearly allows for a greater sentence upon circumstances such as these, where new light has been shed upon the trial judge between an original sentence (or agreement) and a subsequent sentence after retrial (or after the agreement is abrogated and the defendant goes to trial). The important consideration is that the defendant not be penalized for exercising his constitutional rights. Herein, the record affirmatively so reflects. A show of leniency to those who exhibit contrition by admitting guilt does not carry a corollary that the trial judge indulges an improper policy (in general or in a specific case) of penalizing those who elect to stand trial. United States v. Araujo, 539 F.2d 287 (2nd Cir. 1976). Unlimited discretion as to the grant of mercy (e.g., in a plea agreement), as opposed to the imposition

of a death sentence, is certainly constitutionally permissible. Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 349 (1976).

United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) is inapposite. That case struck down a state statute which mandated the death penalty upon (and only upon) a jury recommendation of such. Thus, defendants were encouraged to plea, inasmuch as the death sentence could not be imposed absent a jury. Herein, there is no encouragement to plea, since the ultimate sentence pronounced would still have rested with the trial judge after a trial. A jury recommendation of death herein would not necessarily have resulted in the death penalty, as it would have in Jackson.

The bottom line with reference to this issue is that the facts do not support the issue raised. Petitioner has done nothing more than manufacture facts and attempt to bootstrap a contention that the death penalty was imposed simply because he chose a jury trial. Nothing could be further from the truth. The death penalty was fully supported by the findings of fact. It was not imposed in an arbitrary or capricious manner. The trial judge never agreed to any lesser sentence at any time. Under the facts of the instant case, a defendant who receives the death penalty could always argue that it was imposed solely because he went to trial. Certainly, there is no substantial federal question here.

II.

THE "RAPE" PORTION OF AGGRAVATING CIRCUMSTANCE 5(d) OF SECTION 921.141, FLA. STAT. (1977) IS NEITHER VAGUE NOR CONSTITUTIONALLY INVALID.

This issue involves nothing more than the trial judge's use of the term "involuntary sexual battery" rather

than the term "rape" when he was defining the statutory aggravating factors for the jury. The two terms proscribe the same conduct, and the jury was given the definition of this proscribed conduct. A rose by any other name is still a rose. Certainly, there was nothing vague about this. It cannot go unnoticed that Section 921.141(5)(d), Fla. Stat. (1977), which specifies that it shall be an aggravating factor if the capital felony was committed while the defendant was engaged in the commission of, or flight after committing any rape, is not dependent upon proof of violation of a particular statute during which the capital felony was committed, but is dependent upon proof of the felonious conduct identified by the crime specified. In State v. Dixon, 283 So.2d 1 (Fla. 1973), the Florida Supreme Court viewed the legislative intent in promulgating this aggravating circumstance to include capital felonies committed as part of another dangerous and violent felony. It would therefore seem apparent that it is the felonious conduct which brings into play the existence of the aggravating circumstance in question. Indeed, the Florida Supreme Court has so interpreted that aggravating circumstance. Hoy v. State, 353 So.2d 826 (Fla. 1977); Raulerson v. State, 358 So.2d 826 (Fla. 1978).

True, the law of rape in Florida was repealed in 1974. But it was replaced in the very same legislative act by sexual battery. Chapter 74-121, Laws of Florida. Further, Respondent admits that the new sexual battery law was broken up into more categories than the old rape law. However, the definition that was given to the jury in the case sub judice was solely that of "involuntary sexual battery," which parallels the old rape statute.

The defendant cannot reasonably claim vagueness or lack of notice, not only for the reasons specified above, but also because the acts which he committed were in fact a traditional rape. The mere fact that the trial court

referred to this conduct as an involuntary sexual battery is of no avail to Petitioner. The conduct of Petitioner constituted the dangerous and violent felony of rape, which now is proscribed in Florida as "involuntary sexual battery." There was no reason for Petitioner to suspect that his conduct fell outside the scope of the statute. Rose v. Locke, 423 U.S. 48, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975).

Therefore, the Florida Supreme Court's analysis was not equivalent to a judicial adoption of an aggravating circumstance not statutorily authorized, as Petitioner implies. It was nothing more than a recognition that the aggravating circumstance of rape was defined when the trial judge defined involuntary sexual battery. Since the rape specified in Section 921.141(5)(d), Fla. Stat. (1977), is in fact an involuntary sexual battery, and Petitioner's conduct did indeed constitute a rape (or involuntary sexual battery), he is in no position to claim that the trial court used the term "involuntary sexual battery" rather than the term "rape," since the former term did nothing more than replace the latter term. The two terms specify the same conduct, and said conduct was proven. There is no substantial federal question involved with reference to this issue. It is a matter of state law.

III.

PETITIONER WAS NOT DENIED HIS RIGHT TO A FAIR CROSS-SECTION OF THE COMMUNITY BY FLORIDA'S EXEMPTION, ON REQUEST, OF MOTHERS WITH CHILDREN, FROM SERVICE ON JURIES.

It is indeed curious that Petitioner claims a Sixth Amendment violation of his right to a cross-section of the community as potential jurors, because the very class which Petitioner is speaking of was represented on Petitioner's jury! There was indeed at least one mother with children younger than 15 years old on Petitioner's jury (T 157; R 63).

Consequently, where is Petitioner's standing to even raise such a point? In essence, Petitioner has failed to bring himself within that group of defendants who may have suffered from the application of the statute in question. As such, he has clearly failed to demonstrate that he was harmfully affected by the particular feature of the statute which he claims makes it unconstitutional. A litigant should not be heard to urge the unconstitutionality of a statute when he is not harmfully affected by the particular features of the statute alleged to be in conflict with the Constitution.

Petitioner attempts to bootstrap his argument by a citation to the recent Florida Supreme Court case of Alachua County Court Executive, et al. v. Kirk Anthony Alachua County Juror No. 006, ___ So.2d ___, Case No. 61,209, opinion filed July 29, 1982, 1982 Fla.L.W. 347 (Fla. 1982). However, the Florida Supreme Court struck down the statute, not on Sixth Amendment grounds, but on equal protection grounds. The plaintiff in that case was a potential male juror with children under 15 years of age. The Florida Supreme Court recognized that this statute presented a classic distinction based upon sex. The issue did not involve a defendant's Sixth Amendment rights.

Indeed, the statute in question does not deny a defendant of a jury constituting a fair cross-section of the community. Women of all ages must serve, as well as men of all ages. Thus, Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), does nothing but favorably affect the Florida Supreme Court's analysis. Women with children under 15 years of age is simply not a constitutionally significant class. This is especially the case with reference to the facts of the instant trial, wherein this "class" was indeed represented on Petitioner's jury.

Respondent agrees with Petitioner, that a defendant has the right to a fair cross-section of the community as

potential jurors under the Sixth and Fourteenth Amendments. However, Florida's statute does not deny a defendant this right and, even if it did, Petitioner's jury was not affected by the existence of the statute. There is no substantial federal question involved in this issue under these facts.

CONCLUSION

Based upon the foregoing argument, supported by the circumstances and authorities cited therein, Respondent would respectfully request that this Honorable Court deny certiorari jurisdiction over the instant matter.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, FL 32304

Jay B Stevens, Asst atty Gen (for)

ROBERT L. BOGEN
Assistant Attorney General
111 Georgia Avenue, Room 204
West Palm Beach, FL 33401
(305) 837-5062

Counsel for Respondent